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element of privilege, but that truth is the only defense a newspaper can plead.¹⁴

One cannot, however, quarrel with the holding of the court for, in the last analysis, the doctrine of privilege rests in public policy. The extent and existence of privilege in communications concerning a public officer or candidate are determined by balancing public good against private hurt.¹⁵ The previous California cases favored that policy which protected the individual, whereas, in the Snively case, the court, realizing that by so doing, one man might possibly lose his reputation with the whole public, nevertheless adopted that policy which would secure to the public an absolutely unrestrained discussion of officers and candidates.

From a social standpoint, it is hard to say which is the better. Under the rule of *Jarman v. Rea*, there was possibly a restraint on free discussion of candidates due to fear on the part of newspapers of making mistakes, although one was not greatly impressed with the idea "that statements of fact concerning public men and charges against them were unduly guarded or restrained." Under the rule of the principal case, however, it seems that a veritable immunity bath is given to newspapers. It remains to be seen whether the court has provided a shield from beneath which "newspapers may hurl javelins of false and malicious slander against public officers and candidates with impunity", causing honorable and worthy men to quit the field of public service.

L. L. T.

PROPERTY: APPORTIONMENT AND ACCRETIONS: LANDLORD AND TENANT: WAIVER OF FORFEITURE—Suppose it is necessary to determine the respective rights of owners to a space under or upon the water in front of a shore line, or suppose it is necessary to apportion accretions as between adjoining owners, what is the rule to be adopted? Authorities agree that extension in the same direction of the owners' boundaries is not ordinarily the proper way to apportion such areas. The objection is that such extension is inequitable where the boundaries reach the shore at different angles.¹ And so it is the

¹⁴ Both the cases cite many of the cases in note 1, *supra*, as authority and in them the privilege is denied absolutely. It is true, however, that in one place in *Dauphiny v. Buhne* the court stated that "one can justify the publication of a libel against a candidate for public office upon privilege only by proof that accusation is true", yet the gist of the decision is that there is no relation calling for privilege, and, as a result, the only justification would be truth.

¹⁵ *Hallam v. Post Publishing Co.*, *supra*, n. 1.

¹ *Berry v. Hoogendorn* (1906) 133 Ia. 437, 108 N. W. 923; *Menesha Wooden Ware Co. v. Lawson* (1888) 70 Wis. 600; *Kehr v. Snyder* (1885) 114 Ill. 313, 2 N. E. 68, 55 Am. Rep. 866; *People v. Schermerhorn* (1855) 19 Barb. (N. Y.) 540; *Heirs of Delord v. City of New Orleans* (1856) 11 La. Ann. 699; 3 *Farnham, Waters and Water Rights*, p. 2476.

general practice to apply an equitable doctrine.² The rule most frequently adopted as effecting an equitable apportionment in such cases is to allot to each owner the same proportion of the frontage or newly formed shore line as he has of the shore or as he had of the original shore line.³ Though the actual shore line is usually taken as the basis of determination, only the general line of frontage is considered where there are deep indentations or sharp projections which would result in an inequitable division.⁴ However, in some decisions it has been held that the division line is to be run at right angles to a straight base line. This base line is to be determined by such factors as the general course of the shore, or the general line of navigability.⁵ But this latter doctrine seems to have been applied only where it has been possible to run a straight base line, and the underlying theory has been the same as in the rule of proportional division.⁶ Hence, where it has been difficult to apply or has been inequitable to apply the straight base line rule, or where the shore line is circular, the frontage or newly formed shore line, as the case may be, is divided proportionally to the shore or old frontage.⁷ It would appear, then, when one disregards all the niceties of difference, that the equitable principle of proportional division is fundamental, and variations of the straight base line rule are usually made only for convenience in a particular case or class of cases.

In *Fraser's Million Dollar Pier Company v. Ocean Park Pier Company*⁸ the straight base line doctrine is indicated as the fundamental principle for the division of waterfronts and accretions. In that case the court determined the bounds between two municipal

² *Nirdlinger v. Stevens* (1919) 262 Fed. 591; *Stark v. Meriwether* (1916) 98 Kan. 10, 157 Pac. 438, Ann. Cas. 1918E 993; *Yuttermann v. Grier* (1914) 112 Ark. 366, 166 S. W. 749; *Hohl v. Iowa Central Ry. Co.* (1913) 162 Ia. 66, 143 N. W. 850; *Smith v. Leavenworth* (1911) 101 Miss. 238, 57 So. 803; *Peuker v. Canter* (1901) 62 Kan. 363, 63 Pac. 617; *Gorton v. Rice* (1900) 153 Mo. 676, 55 S. W. 241; *Deerfield v. Arms* (1835) 17 Pick. (Mass.) 41.

³ *Miller v. Lloyd* (1918) 275 Mo. 35, 204 S. W. 257; *Stark v. Meriwether*, supra, n. 2; *Hathaway v. Milwaukee* (1907) 32 Wis. 249, 111 N. W. 570, 112 N. W. 455, 122 Am. St. Rep. 975, 9 L. R. A. (N. S.) 778; 122 Am. St. Rep. 982, note, and cases there cited; 25 L. R. A. (N. S.) 257, note, and cases there cited; Ann. Cas. 1914A 481, note, and cases there cited; Ann. Cas. 1918E, note; 1 R. C. L. 244; 29 Cyc. 353.

⁴ *Columbia Land Co. v. Van Dusen Investment Co.* (1907) 50 Ore. 59, 91 Pac. 469, 11 L. R. A. (N. S.) 287; *Brown v. Spreckels* (1906) 18 Hawaii 91; *People ex rel. Cornwall v. Woodruff* (1898) 30 App. Div. (N. Y.) 43, 51 N. Y. Supp. 515 (affirmed 157 N. Y. 709, 53 N. E. 1129); 122 Am. St. Rep. 982, note, and cases there cited.

⁵ *Tabor v. Hall* (1902) 23 R. I. 613, 51 Atl. 432; *Montgomery v. Shaver* (1901) 40 Ore. 244, 66 Pac. 923; 21 L. R. A. 776, note, and cases there cited; 122 Am. St. Rep. 982, note, and cases there cited; 3 Farnham, Waters and Water Rights, p. 2478.

⁶ *Peoria v. Central National Bank* (1896) 224 Ill. 43, 79 N. E. 296; *Smith v. Johnson* (1896) 71 Fed. 647; *Northern Pine-Land Co. v. Bigelow* (1893) 84 Wis. 157, 54 N. W. 496, 21 L. R. A. 776.

⁷ *Blodgett & Davis Lumber Co. v. Peters* (1891) 87 Mich. 506, 49 N. W. 917, 24 Am. St. Rep. 175; *Walker v. Boston & Maine Ry.* (1849) 3 Cush. 1; 21 L. R. A. 776, 779, note.

⁸ (April 1, 1921) 61 Cal. Dec. 452, 558, 197 Pac. 328, 198 Pac. 212.

jurisdictions with regard to the space in front of the shore line. It was quite properly held that the course of the land boundaries should not be extended over the space in question. The court then laid down this test: The boundary over the water or new area to be divided is to be fixed by a line drawn perpendicular to the general course of the shore or old frontage. This line is to be connected with the end of the old boundary. And this rule of the straight base line was suggested even for a case where the shore line is circular. The new boundary line is then to be perpendicular to a tangent drawn on the circle at the point of intersection with the old boundary line. This last statement appears to be entirely novel, but when taken with the general doctrine as indicated by the court, it seems that the straight base line rule is laid down as the fundamental principle of division in such cases. It is quite conceivable that the California court wanted to depart from the general doctrine but it is a curious fact that such departure should be made without consideration of the general rule. One may well entertain doubt as to the necessity of hewing out such new doctrine where polishing of the old would suffice.

Fraser's Million Dollar Pier Company v. Ocean Park Pier Company⁹ also brings up another point worth considering for a moment. At first blush the case appears to depart from generally recognized doctrines concerning the waiver of a cause of forfeiture in a lease. But on more careful reading, the position taken is seen to be one well fortified by authority.

As to causes for forfeiture of a lease, it is clear that default does not end the tenancy until the landlord so elects. And after a breach has occurred, the landlord may waive the right to declare a forfeiture. Furthermore, there seems to be general accord as to what constitutes waiver of a cause of forfeiture.¹⁰ The most usual case of such waiver occurs where the landlord accepts rent after he knows of a breach of covenant by the tenant.¹¹ That this is the general doctrine in California has been quite evident since the leading case of McGlynn v. Moore.¹² However, the cases have suggested two distinctions. First, it is quite clear that the lessor must have full knowledge of the cause of forfeiture. Second, the cause of forfeiture must have been prior to the receipt of rent.¹³ But the California cases bearing on this latter point have not always been clear. Some have said that there can be no waiver of a cause of forfeiture on a "continuing covenant", and these courts have spoken of a

⁹ *Supra*, n. 8.

¹⁰ 1 Tiffany, *Real Property* (2nd ed.), p. 300, et seq., § 84.

¹¹ 2 Tiffany, *Landlord and Tenant*, p. 1387, § 194; 2 Taylor's *Landlord and Tenant* (9th ed.), p. 90, et seq., § 497; 11 L. R. A. (N. S.) 831, note.

¹² McGlynn v. Moore (1864) 25 Cal. 384.

¹³ Jones v. Maria (1920) 32 Cal. App. Dec. 554, 191 Pac. 943; Mathews v. Digges (1920) 31 Cal. App. Dec. 233, 235, 188 Pac. 283; Myers v. Herskowitz (1917) 33 Cal. App. 581, 583, 165 Pac. 1031; Stevinson v. Joy (1912) 164 Cal. 279, 284, 128 Pac. 751; German-American Savings Bank v. Gollner (1909) 155 Cal. 683, 691, 102 Pac. 932; Jones v. Durrer (1892) 96 Cal. 95, 30 Pac. 1027.

"continuing cause of forfeiture". It is submitted that such language is very properly open to criticism. In the New York case of *Conger v. Duryee*¹⁴, the court revealed the kernel of the matter with regard to such phrases: "In none of these cases is it strictly accurate to say that there is a 'continuing cause of forfeiture'. The covenants continue, but the particular breach which is the cause of the forfeiture does not."

The case of *Fraser's Million Dollar Pier Company v. Ocean Park Pier Company*¹⁵ is in accord with the rule that the cause of forfeiture must have been prior to the receipt of rent. But because this is the doctrine with regard to which the language of earlier California courts is open to criticism, and because this point in the principal case was briefly disposed of in such way as to add nothing to the clarity of the rule, it is well to take notice of these distinctions.

C. C. H.

WATERS: FLOOD WATER DOCTRINE IN CALIFORNIA—The rules of the civil law¹ as well as those of the common law² distinguish between extraordinary and unusual floods and ordinary floods, recognizing the right of the property owner to protect himself against the former, even though by so doing he causes injury to the property of his neighbor, but denying such right of protection when applied to ordinary floods. Many state courts make the same distinction.³ The courts of our own state, however, though they do not differentiate between extraordinary and ordinary floods,⁴ do clearly distinguish between "flood water" and "surface water",⁵

¹⁴ *Conger v. Duryee* (1882) 90 N. Y. 594, 12 Abb. N. C. 43.

¹⁵ *Supra*, n. 8.

¹ *Menzies v. Breadalbane* (1826) 3 Bligh (N. S.) 414, 4 Eng. Rep. R. 1387; dicta; *Cubbins v. Miss. R. R. Commission* (1915) 241 U. S. 351, 364, 366, 60 L. Ed. 1041, 36 Sup. Ct. Rep. 671; See also 8 California Law Review, 197, footnotes 24, 25, and 26. The unqualified statement in footnote 24 to the effect that "the civil law permits owners to fight off flood waters" is probably too broad and should be limited to extraordinary flood waters.

² *Menzies v. Breadalbane*, *supra*, n. 1; *Rex v. Trafford* (1831) 1 Barn. & Ad. 874, 109 Eng. Rep. R. 1011. However, recent English cases show a tendency to recognize such right of protection even against ordinary floods. *Whalley v. Lancashire etc. Ry. Co.* (1884) 13 Q. B. D. 131, 136; dicta; *Nield v. London & N. W. Ry. Co.* (1874) L. R. 10 Exch. 4.

³ *Uhl v. Ohio River Ry. Co.* (1904) 56 W. Va. 494, 3 Ann. Cas. 201; *Cubbins v. Miss. R. R. Commission*, *supra*, n. 1; note 25 L. R. A. 531; *Kinney on Irrigation and Water Rights* (2nd ed.) p. 519.

⁴ *Horton v. Goodenough* (1920) 60 Cal. Dec. 650, 194 Pac. 34; *Gray v. McWilliams* (1893) 98 Cal. 157; 32 Pac. 976, 35 Am. St. Rep. 163, 21 L. R. A. 593; *Lamb v. Reclamation Dist.* (1887) 73 Cal. 125, 14 Pac. 625, 2 Am. St. Rep. 775.

⁵ *Thompson v. La Fetra* (1919) 180 Cal. 771, 183 Pac. 152; Cases cited in note 4, *supra*; for the same distinction see also the leading case of *Crawford v. Rambo* (1886) 44 Ohio St. 279, 71 N. E. 429.